



University of Hawaii at Manoa

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RL:0370

SB 41 RELATING TO ENVIRONMENTAL RIGHTS

Statement for
Senate Committee on
Ecology, Environment and Recreation
Public Hearing, 6 April 1979

By
Doak C. Cox, Environmental Center
Leslee Hornick, Environmental Studies
Jon Van Dyke, Law School

SB 41 is intended to implement the environmental rights amendment to the State Constitution. This statement on the bill does not represent an institutional position of the University.

SB 41 is responsive to the constitutional amendment, Section 9 of Article XI, which was adopted in 1978. Like the amendment, the bill appropriately qualifies the right as pertaining to a clean and healthful environment as defined by law. Like the amendment, the bill would provide that individuals have standing to sue in the courts for abridgements of the environmental rights.

The bill would provide, however, that individuals must post bonds upon the filing of suits for violations of environmental rights. This provision are not required in the constitutional amendment; its conformity with the intent of the amendment is questionable; and the circumstances under which the bonds would be forfeit, and to whom they would be forfeit, is not indicated in the bill.

The proposed bond requirement is presumably intended to discourage nuisance suits. It is probably intended that, if the court finds that a particular environmental rights suit has been brought in bad faith, it may call for forfeiture of the bond to pay for the legal costs of the defendant. Some concern over the possibility of nuisance suits is legitimate. However, experience with similar legislative elsewhere has indicated that nuisance suits are rare. The bond requirement will clearly discriminate against individuals with small financial means.

A bill introduced in the House, HB 478, had an intent identical to that of SB 41 but significantly different provisions. The attached Environmental Center comments (Env. Ctr., RL:0332) on HB 478 may be of interest to this committee.



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HB 478 RELATING TO ENFORCEMENT OF ENVIRONMENTAL RIGHTS

Statement for
House Committee on
Ecology and Environmental Protection
Public Hearing, 23 February 1979

By
Doak C. Cox, Environmental Center
Williamson Chang, Law School
Leslee Hornick, Environmental Studies
John Sorenson, Geography
Jon Van Dyke, Law School

HB 478 proposes to add to Hawaii Revised Statutes a new section relating to the enforcement of environmental rights. This statement on the bill does not reflect an institutional position of the University.

HB 478 has undoubtedly been introduced in response to the recently adopted amendment of the State Constitution that deals with an environmental right.

The environmental right is described in subsection (c) of the proposed Act using only a part of the language defining it in the constitutional amendment. The portion of the amendment underscored below has been omitted:

"Each person has the right to a clean and healthful environment,
as defined by laws relating to environmental quality including
control of pollution and conservation, protection and enforcement
of natural resources.

The omitted language is of critical importance. Environmental cleanliness and healthfulness are relative, not absolute terms. None of us can live without contributing to some losses of environmental cleanliness and healthfulness. Without relating the right to standards legally adopted, there is no limit to the minuteness of the degradations that would constitute violations of the right. By relating the right to the laws, the dimensions of the right will change as changes in understanding of the healthfulness aspects of the environment are reflected in amendments of the laws.

The full definition of the right used in the Constitution should be used in the bill.

Subsection (c) of the proposed new section would set a limit to the time within which "action" may be brought to enforce the right. This subsection seems intended to relate to court suits, and the term action should be qualified in this sense to distinguish actions of this type from actions intended to result in administrative decisions or changes in decisions.

The 30-day time limit proposed in this subsection is reasonable only if its beginning is definite. The 30-day period might, for example, begin with the public announcement of an agency decision that was contested in the course of the agency decision-making process. In subsection (c)(1) and (c)(2), however, there are no such definite times set for the beginning of the period.

In (c)(1) reference is made to the challenger's having participated in the agency's decision-making process, and to his having sought administrative review after the agency's decision. The process of participation is not limited to a definite time, and the challenge may have had no response to his request for review with 30 days after he made the request. In (c)(2) the 30-day period would begin at the expiration of a "reasonable time" after a request for remedy of a violation, but this is not a definite starting time.

(c)(3) appears in actuality to be a provision for an exception by the courts to the 30-day limitation, rather than a definition of when the 30-day period will begin.

Section (c) further provides that any person may become a party to an agency decision proceeding regarding environmental rights. "Person" is defined in subsection (a) as including individuals, partnerships, corporations, and associations, etc. but excluding agencies. The authors of this statement have somewhat divergent opinions as to this provision. These include the opinions that:

- 1) Business enterprises that already have considerable weight in decision making processes will be granted undue extra advantage through the provision.
- 2) The provision should be applicable to agencies other than the agency making the particular decision at issue.
- 3) The provision opens the door too widely to participation in decision making.
- 4) The provision rectifies agency tendencies, in some cases supported by law, to close the door to persons with genuine concerns, and even expert competence, though not concerns reflected in property.

Subsection (d) requires that "good faith" is necessary to bringing suit in the courts for enforcement of environmental rights, and requires the posting of a bond to cover the defendant's costs if the court finds a suit brought not in good faith. Some protection against nuisance suits may be necessary. However, experience elsewhere with similar legislation indicates that nuisance suits will be rare. It is not clear the enforcement of environmental rights should be treated differently from other causes of action. A defendant always has an "abuse of process" cause of action if a plaintiff demonstrably brings a complaint in bad faith. The bond requirement will clearly have the effect of discriminating against those with small financial means.



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